No. 90-1029



IN THE

# Supreme Court of the United States

OCTOBER TERM, 1990

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EASTMAN KODAK COMPANY,

*Petitioner,*

v.

IMAGE TECHNICAL SERVICES, *et al.*,

*Respondents.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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## BRIEF *AMICUS CURIAE* OF DIGITAL EQUIPMENT CORPORATION, HEWLETT-PACKARD COMPANY, PRIME COMPUTER, INC., UNISYS CORPORATION, AND WANG LABORATORIES INC. IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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S.T. JACK BRIGHAM III
MARCIA HOWE ADAMS
HEWLETT-PACKARD COMPANY
3000 Hanover Street
Palo Alto, CA 94303
(415) 857-5816

KURT W. MELCHIOR
*Counsel of Record*
NOSSAMAN, GUTHNER, KNOX & ELLIOTT
50 California Street
San Francisco, CA 94111-4712
(415) 398-3600

ROBERT A. SKITOL
JAMES A. MEYERS
PEPPER, HAMILTON & SCHEETZ
1300 Nineteenth Street, N.W.
Washington, D.C. 20036-1685
(202) 828-1200

*Attorneys for Hewlett-Packard Company*

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[Additional Attorneys Listed on Inside Front Cover]

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

IVOR CARY ARMISTEAD, III
Law Department
Digital Equipment Corporation
111 Powdermill Road
Maynard, MA 01754
(508) 493-3980

*Attorney for Digital Equipment Corporation*

JAMES W. OLSON
Law Department
Unisys Corporation
P.O. Box 500
Bluebell, PA 19424-0001
(215) 986-4105

*Attorney for Unisys Corporation*

STEPHEN WASINGER
HONIGMAN MILLER SCHWARTZ AND COHN
2290 First National Building
Detroit, MI 48226-3583
(313) 256-7726

*Attorneys for Prime Computer, Inc.*

FLORINDA J. IASCONE
Wang Laboratories Inc.
1 Industrial Avenue
Lowell, MA 01851
(508) 967-6367

*Attorney for Wang Laboratories Inc.*

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### INTEREST OF AMICUS CURIAE

Amici are all members of the computer industry. Intense competition in this industry—now greatly pressed from abroad—has produced wave after wave of innovation that has changed the face of the world. Calculations that once took weeks (if they could be done at all) now take minutes. Today, a worker sitting at a desk can guide rockets through space, activate the nation's defenses, access vast libraries

of information or operate an industrial assembly line—all by computer. Computers have made typewriters, slide rules, linotype machines and the like obsolete. And tomorrow the computer will let Americans order groceries and transact their banking and other business through their home television sets.

Interbrand systems competition has fostered these advances in technology. The decision below puts such interbrand competition in jeopardy. In the computer business, the highest-performance, lowest-cost combinations of hardware, software and service are required to meet the demands of sophisticated buyers adept at comparing the overall quality and price of each element of systems performance, including post-sale service. Amici have neither the ability nor the incentive to take advantage of system users by lowering the quality or raising the price of such service. Any firm attempting to do so would quickly lose system sales and place its entire systems business at risk. Computer users have greatly benefited from the explosive rate of technological change and the resulting great decline in the cost of computing power fostered by intense systems competition.

These realities of the computer and similar industries are at the heart of numerous precedents rejecting attempts by antitrust plaintiffs to label one or another firm in these industries as a "monopolist" in or as having "market power" over a "market" limited to one isolated part of that firm's overall systems or equipment business. Under these precedents, a firm's lack of market or monopoly power in the interbrand market for computer sales precludes the service of its brand of computers from being a relevant antitrust market because of the inextricable relationship between such service and interbrand systems competition. Numerous other precedents give computer manufacturers the flexibility to make business decisions to enhance their interbrand competitiveness even though such decisions may injure intrabrand rivals.



A majority of the court of appeals panel below misapplied these controlling precedents. The result, if allowed to stand, could permit a jury to find that petitioner Eastman Kodak Company ("Kodak")—or any other integrated firm—possesses market or even monopoly power over servicing its own brand of equipment even while plainly lacking such power in the interbrand equipment market. Such a result makes no economic or antitrust sense. The majority's misapplication of market definition and market and monopoly power principles may well materially impair competition by restraining the freedom of equipment and systems manufacturers to innovate with regard to service and other product development efforts so as to enhance their overall competitiveness. Similarly, the erroneous finding below of a triable issue regarding Kodak's conduct extends a manufacturer's duty to deal with intrabrand rivals to unprecedented limits, and could thereby chill manufacturers from engaging in vigorous interbrand competition.

In short, the effect of the decision below will be to discourage innovation and thereby to freeze the status quo. To maintain competition in the computer industry, we urge the Court to review and reverse the decision below.[1]

## ARGUMENT

The decision below is contrary to law and misguided. It conflicts with this Court's decision in *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984), and with the decisions of several other courts of appeals. The majority below employed market definition and market and monopoly power principles that defy antitrust and economic sense.

This case presents an ideal and necessary opportunity for the Court to clarify the market definition and monopoly

[1] This brief is filed pursuant to Rule 37.2 of the Rules of this Court, accompanied by the written consent of all parties.

power requirements of Section 2 of the Sherman Act, 15 U.S.C. § 2, which it has not addressed in 25 years. During that time, "no aspect of antitrust enforcement has been handled nearly as badly as market definition. This failure has resulted in part because of persistent and unreconciled conflicts of approach in important judicial opinions." R. Pitofsky, *New Definitions of Relevant Market and the Assault on Antitrust*, 90 Colum. L. Rev. 1805, 1807 (1990) (footnote omitted). This case also provides an opportunity to clarify the market power requirement of the tying offense under Section 1 of the Sherman Act, 15 U.S.C. § 1, which the Ninth Circuit has misapplied on more than one occasion.[2]

As Justices White and Blackmun recognized in *Digidyne*,[3] which raised issues similar to those involved here, the logic of the decision below has potentially enormous consequences for the ability of integrated firms—most of which compete in highly competitive international markets—to provide the lowest-price, highest-quality systems or equipment to consumers. More specifically, the decision below will have a tremendous impact on the way these firms structure their equipment and service offerings. Numerous pending cases involve the same or substantially similar market definition and market or monopoly power issues as those involved here, and the results have been confusing and inconsistent. *See* Pet. App. at 42E-43E. This Court's prompt intervention is required to provide uniform jurisprudence in this important area of the law and to

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[2] *See also Digidyne Corp. v. Data Gen. Corp.*, 734 F.2d 1336 (9th Cir. 1984), *cert. denied*, 473 U.S. 908 (1985). Since many of the high technology companies that may be affected by the decision below are subject to suit in the Ninth Circuit, the decision below threatens a particularly deleterious effect on competition in this vital sector of the U.S. economy.

[3] *Data General Corp. v. Digidyne Corp.*, 473 U.S. 908 (1985) (White and Blackmun, J.J., dissenting from denial of the petition for a writ of certiorari). *See infra* at 10.



eliminate the possibility of further confusion or inconsistency.

The decision below improperly inhibits interbrand systems manufacturers from engaging in procompetitive conduct. The majority held that there was a triable issue regarding the "intent" underlying Kodak's refusal to sell parts to its intrabrand competitors, even though the record forecloses any claim that those competitors need Kodak's parts in order to compete.[4] This holding extends to unprecedented limits a monopolist's duty to deal (assuming *arguendo* Kodak's monopoly power). Worse, it chills systems manufacturers' actions to enhance interbrand competition—where the real clash of market forces occurs—simply because such actions may not be to the liking of intrabrand rivals.

**1. *Tying Issues.*** As stated by the majority below (Pet. App. at 2A), this case involves antitrust claims by independent service organizations ("ISOs") servicing Kodak copier and micrographic equipment attacking Kodak's business policies (a) not to sell replacement parts to Kodak equipment owners that use ISOs for service; and (b) not knowingly to sell replacement parts to ISOs. The first claim alleges an unlawful tying arrangement under Section 1 of the Sherman Act, and the second claim alleges an unlawful refusal to deal under Section 2 of the Sherman Act.

**a.** On the tying claim, respondents did not dispute that Kodak lacks market power in the interbrand markets for copier and micrographic equipment, and the majority below recognized the "logical appeal" in Kodak's argument that it could not have market or monopoly power in the

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[4] A similar question of what conduct a firm alleged to have monopoly power may properly engage in is currently before the Court in *Consolidated Rail Corp. v. Delaware & H. Ry.*, No. 90-380 (cert. filed Sept. 4, 1990), in which the Court has requested the views of the United States.

alleged after-markets for replacement parts and service if it lacks such power in the interbrand markets. Pet. App. at 8A n.3, 19A.[5] Nevertheless, the majority held that there was a triable issue whether Kodak had market power over the alleged "tying product"—Kodak replacement parts—because, in its view, "market imperfections can keep economic theories about how consumers will act from mirroring reality." *Id.* at 10A. Remarkably, it added that, while respondents had "not conducted a market analysis and pin-pointed specific imperfections in the copier and micrographic markets, a requirement that they do so in order to withstand summary judgment would elevate theory above reality." *Id.*

This formulation creates a "theory of reality" that would eliminate summary judgment in a large class of cases. Under the decision below, no tying (or Section 2 monopolization) case could be disposed of until inquiry into hypothetical market imperfections—whose breadth would be limited only by the imagination of the parties' economists—had been made. This result would lead to extremes of economic speculation never intended by the authors of the Sherman Act.

The decision below conflicts irreconcilably with *Jefferson Parish*, which prohibits tying arrangements only when the seller has market power "to force a purchaser to do something that he would not do in a competitive market." *Jefferson Parish*, 466 U.S. at 13-14. The Court there held that defendants' 30% share of the tying product market for hospital services, even combined with evidence of actual market imperfections, was *insufficient as a matter of law* to support a finding of market power: while those market imperfections may have "generate[d] 'market power' in some abstract sense, they d[id] not generate the kind of market power that justifies condemnation of tying." *Id.* at 26-27 (footnote omitted). The majority below failed to abide by *Jefferson Parish* in holding that a 23% market share plus unidentified, theoretical market imperfections could create otherwise nonexistent market power. Review is necessary to correct this plainly erroneous decision, which would elevate innocuous conduct into an antitrust violation.

[5] Specifically, the majority correctly observed that "competition in the interbrand markets might prevent Kodak from possessing power in the parts market" and that

> just as equipment purchasers would turn to one of Kodak's competitors if Kodak tied supercompetitively priced parts or service directly to equipment, equipment purchasers might turn to one of Kodak's competitors if Kodak ties supercompetitively priced service to parts. Kodak's desire to attract new customers might, therefore, keep it from charging supercompetitive prices for service.

Pet. App. at 8A, 9A.



**b.** The majority's holding that Kodak's undisputed lack of market power in the interbrand copier and micrographic equipment markets did not necessarily prevent Kodak from having market power in the alleged after-markets for parts and service (Pet. App. at 10A-12A) is insupportable.[6] If, as is undisputed, Kodak lacks interbrand market power, *a fortiori* it cannot possess such power in any alleged after-market for its parts or service. Any attempt to raise prices above competitive levels in those alleged after-markets would constitute commercial suicide, because the resulting price increase would cost Kodak far more in lost copier and micrographic equipment sales than it could hope to gain in increased parts or service revenues.[7] Thus, as Judge Wallace explained in his dissent below, Pet. App.

[6] It also conflicts with decisions of the First and Sixth Circuits and with other decisions of the Ninth Circuit. *See* Pet. at 18-20.

[7] The district court thus properly entered summary judgment and did *not* err by denying respondents additional discovery; such discovery could not have yielded evidence sufficient to create a triable issue where respondents did not dispute Kodak's lack of interbrand market power.

at 23A, Kodak's lack of interbrand market power *precludes* any possibility of anticompetitive effect in the hypothetical after-markets for parts or service.

This Court has long recognized that *interbrand*, not intrabrand, competition is the antitrust law's "primary concern." *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 52 n. 19 (1977); *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 724, 726 (1988).[8] By contrast, the decision below in effect subordinates interbrand competition to intrabrand competition. Such a result makes no economic or antitrust sense, and must be reviewed and reversed.

**c.** The majority attempted to distinguish this case from the Ninth Circuit's controlling decision in *General Business Sys. v. North Am. Philips Corp.*, 699 F.2d 965 (9th Cir. 1983), and other directly relevant appellate decisions by observing that (a) "Kodak charges up to twice as much as [respondents] for service that is of lower quality"; (b) "in some instances competition from ISOs drove down the price that Kodak was willing to charge for service"; and (c) "in other instances some owners of large Kodak equipment packages will pay higher prices for Kodak service rather than switch to competitors' systems." Pet. App. at 10A-11A. Even if such evidence existed (*see* Pet. at 19-20, 21-22), it would fail to raise a triable issue.

Higher prices for Kodak service could be suggestive of market power "under proper circumstances" (*General*

[8] In *GTE Sylvania*, 433 U.S. at 54, the Court held that the rule of reason, not the per se rule, should apply to vertical nonprice restraints because such restraints "promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products." The Court further noted that "interbrand competition confronting the manufacturer" can provide a "significant check on the exploitation of intrabrand market power because of the ability of consumers to substitute a different brand of the same product." *Id.* at 52 n.19.



*Business Systems*, 699 F.2d at 977), but no such circumstance exists in *this* case.[9] Respondents presented *no* evidence supporting their assertion that Kodak's higher prices resulted from the exercise of market power. Conduct as consistent with lawful as with unlawful competition does not, standing alone, create a triable issue. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986).

The possibility that Kodak charged more than ISOs at one point in time does not mean that it has the power to sustain higher prices over a period of time long enough to permit a trier of fact reasonably to conclude that it has market power. *See Syufy*, 903 F.2d at 665-66 ("[i]n evaluating monopoly power, it is not market share that counts, but the ability to *maintain* market share" (emphasis by the court)). Indeed, as the majority found, in the short run, "competition from ISOs drove down the price that Kodak was willing to charge for service" (Pet. App. at 11A), thus confirming that Kodak lacks the power to sustain higher prices.[10] Over the long run, interbrand competition even more definitively forecloses Kodak from maintaining higher prices; any attempt to do so would only "hasten[ ] the date on which [Kodak] surrender[s] to its competitors" in the equipment market. *General Business*

[9] One circumstance that is not only proper but *essential* to any inference of market power is a showing of "significant barriers to entry"; absent that circumstance, "any attempt to raise prices above the competitive level will lure into the market new competitors able and willing to offer their commercial goods or personal services for less." *United States v. Syufy Enters.*, 903 F.2d 659, 664 (9th Cir. 1990). *Accord United States v. Baker Hughes, Inc.*, 908 F.2d 981, 987 (D.C. Cir. 1990) ("[i]n the absence of significant barriers, a company probably cannot maintain supra-competitive pricing for any length of time"). There is no basis in this record for finding entry barriers allowing Kodak to *maintain* higher prices. Absent such barriers, the mere fact that Kodak might have been charging higher prices at some point in time cannot suffice to create a genuine issue as to its market power.

[10] This evidence, far from distinguishing *General Business Systems*, shows that Kodak lacks market power.

*Systems*, 699 F.2d at 977. *See also GTE Sylvania*, 433 U.S. at 55 ("[t]he availability and quality of [service and repair] affect a manufacturer's goodwill and the competitiveness of his product").

The possibility that some Kodak equipment owners will pay higher service prices rather than switch to competitors' equipment is just a different way of advancing the so-called "lock-in" notion that a buyer becomes "locked in" to components of or service for the product it buys. The courts have repeatedly rejected this notion as a basis for finding market (or monopoly) power.[11]

The only case even arguably supporting the lock-in theory is *Digidyne*. There, however, the Ninth Circuit did *not* find that an alleged lock-in gave defendant market power; it simply observed that lock-in "enhanced" economic power that the court had already found from the existence of a copyright. 734 F.2d at 1341-43. *Digidyne* has been roundly criticized by other courts of appeals, and the Ninth Circuit itself has declined to apply it. *See* Pet. at 16-17.

This Court's denial of the petition for a writ of certiorari in *Digidyne* was over the dissent of Justices White and Blackmun,[12] and against the recommendation of the United States. In urging the Court to grant the petition in *Digidyne*, the United States explained that the lock-in theory is unacceptable as a matter of sound economics because

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[11] *General Business Systems*, 699 F.2d at 975; *Kaplan v. Burroughs Corp.*, 611 F.2d 286, 293-95 (9th Cir. 1979), *cert. denied*, 447 U.S. 924 (1980); *Telex Corp. v. IBM Corp.*, 510 F.2d 894, 917 (10th Cir.), *cert. dismissed*, 423 U.S. 802 (1975); *ILC Peripherals Leasing Corp. v. IBM Corp.*, 458 F. Supp. 423, 429 (N.D. Cal. 1978), *aff'd sub nom. Memorex Corp. v. IBM Corp.*, 636 F.2d 1188 (9th Cir. 1980), *cert. denied*, 452 U.S. 972 (1981).

[12] The dissent in *Digidyne* stated that the question "whether market power over 'locked in' customers must be analyzed at the outset of the original decision to purchase" raised a substantial issue of antitrust law and policy warranting the Court's review. 473 U.S. at 909.



it improperly focuses only on the customer's post-purchase as opposed to pre-purchase alternatives: "the relevant time frame for measuring the seller's competitive position is when the buyer entered into the contract in preference to some alternative arrangement." Brief for the United States as Amicus Curiae at 15, *Data Gen. Corp. v. Digidyne Corp.*, No. 84-761 (U.S. May 1985). The lock-in theory "ignores how competition in the market operates," "depart[s] from commercial and economic reality" and "skews proper analysis" by erroneously assuming that buyers take no steps to avoid lock-in at the time of purchase and that the seller has no need or desire to attract new customers. *Id.* at 14-17.

This case demonstrates the mischief that *Digidyne* has caused. Review is necessary to put to rest once and for all the misguided notion that a supposed "lock-in" effect gives a seller market power.

**2. *Relevant Market Issues.*** The decision below as to the relevant product market for the Section 2 refusal to deal claim warrants review.[13] Respondents defined the relevant market as the service of Kodak equipment. *See* Pet. App. at 18A. The majority held that there was a triable issue on that definition *solely* on the ground that the Ninth Circuit had previously "suggested that service of one company's micrographic equipment can be a relevant market under Section 2." *Id.*[14]

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[13] On the Section 2 claim, the majority admitted to "hav[ing] more trouble with the monopoly power . . . issue" because monopoly power "is something more than the market power that is a prerequisite to liability under Section 1." Pet. App. at 18A, 19A. Since respondents failed to present significant probative evidence to overcome summary judgment on their Section 1 claim, they necessarily also failed to present significant probative evidence on their Section 2 claim.

[14] The majority cited *Dimidowich v. Bell & Howell*, 803 F.2d 1473, 1480-81 n.3 (9th Cir. 1986), *modified*, 810 F.2d 1517 (9th Cir. 1987). But, as Kodak showed (Pet. at 25 n.11), the *Dimidowich* court's dis-

This holding makes no economic or antitrust sense. As this Court stated in *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 393 (1956) (footnote omitted),

> one can theorize that we have monopolistic competition in every nonstandardized commodity with each manufacturer having power over the price and production of his own product. However, this power that, let us say, automobile or soft-drink manufacturers have over their trade-marked products is not the power that makes an illegal monopoly. Illegal power must be appraised in terms of the competitive market for the product.

The Court held that the "competitive market" must take account of the constraints on a firm's ability to raise price or limit output, and specifically must include all reasonably interchangeable substitutes for the products in question and all suppliers that could readily assign productive capacity if given proper incentive to do so. *Id.* at 389-94. *See also Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962); *United States v. Columbia Steel Co.*, 334 U.S. 495, 510-11 (1948).

This proposition has become an antitrust axiom. Following *du Pont*, "the lower courts have consistently refused to restrict a relevant market to a company's trademarked product." *Shaw v. Rolex Watch, U.S.A., Inc.*, 673 F. Supp. 674, 678 (S.D.N.Y. 1987). *See also Domed Stadium Hotel, Inc. v. Holiday Inns, Inc.*, 732 F.2d 480, 488 (5th Cir. 1984) ("as a matter of law, . . . absent exceptional market conditions, one brand in a market of competing brands cannot constitute a relevant product market"). Numerous

cussion of Section 1 issues has nothing to do with relevant market definition under Section 2. Its colloquial use of the word "market" was, at most, dictum.



decisions have rejected market definitions limited to a single manufacturer's equipment or to service therefor.[15]

In *General Business Systems*, 699 F.2d at 972, the Ninth Circuit rejected, as a matter of law, a market definition limited to magnetic ledger cards used in defendant's computer systems in light of undisputed evidence of competition in the interbrand systems market. In *Bushie v. Stenocord Corp.*, 460 F.2d 116, 121 (9th Cir. 1972), the Ninth Circuit affirmed summary judgment against a complaint alleging a relevant market limited to servicing Stenocord equipment because there was no evidence "that Stenocord dominated the market for office dictating machines generally, or that it controlled a major share of the

[15] Many such cases have involved the computer industry. *E.g., A.I. Root Co. v. Computer/Dynamics, Inc.*, 806 F.2d 673, 675 (6th Cir. 1986); *General Business Systems*, 699 F.2d at 972-75; *Telex*, 510 F.2d at 919; *Allen-Myland, Inc. v. IBM Corp.*, 693 F. Supp. 262, 272-79 (E.D. Pa. 1988); *In re IBM Peripheral EDP Devices Antitrust Litigation*, 481 F. Supp. 965, 985 (N.D. Cal. 1979), *aff'd sub nom. Transamerica Computer Co. v. IBM Corp.*, 698 F.2d 1377 (9th Cir.), *cert. denied*, 464 U.S. 955 (1983); *ILC Peripherals*, 458 F. Supp. at 429.

The rule is the same for other industries. *E.g., International Logistics Group, Ltd. v. Chrysler Corp.*, 884 F.2d 904, 908 (6th Cir. 1989) ("a manufacturer cannot be charged with antitrust violations if it monopolizes its own brand"), *cert. denied*, 110 S. Ct. 1783 (1990); *H.L. Hayden Co. v. Siemens Medical Sys., Inc.*, 879 F.2d 1005, 1018 (2d Cir. 1989); *H.J., Inc. v. International Tel. & Tel. Corp.*, 867 F.2d 1531, 1538 (8th Cir. 1989); *Key Financial Planning Corp. v. ITT Life Ins. Corp.*, 828 F.2d 635, 643 (10th Cir. 1987); *Seidenstein v. National Medical Enters.*, 769 F.2d 1100, 1106 (5th Cir. 1985); *Transource Int'l, Inc. v. Trinity Indus., Inc.*, 725 F.2d 274, 282-83 (5th Cir. 1984); *Dunn & Mavis, Inc. v. Nu-Car Driveaway, Inc.*, 691 F.2d 241, 244 (6th Cir. 1982); *Parsons v. Ford Motor Co.*, 669 F.2d 308, 312 (5th Cir.), *cert. denied*, 459 U.S. 832 (1982); *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 117-18 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981); *H & B Equip. Co. v. International Harvester Co.*, 577 F.2d 239, 242 (5th Cir. 1978); *ALW, Inc. v. United Air Lines*, 510 F.2d 52, 56 (9th Cir. 1975); *Mullis v. ARCO Petroleum Corp.*, 502 F.2d 290, 296 (7th Cir. 1974).

market for machines of its particular type." And in *Spectrofuge Corp. v. Beckman Instruments, Inc.*, 575 F.2d 256, 278-86 (5th Cir. 1978), *cert. denied*, 440 U.S. 939 (1979), the Fifth Circuit held that there was no market limited to servicing Beckman scientific instruments because service was an integral part of the market for equipment sales. *See also United States v. Grinnell Corp.*, 384 U.S. 563, 572-73 (1966) (no submarkets for central station alarm services because, to compete effectively, central station companies had to offer all or nearly all types of alarm services).

These cases preclude finding a market limited to one element (such as servicing) of one manufacturer's products if competition with other manufacturers prevents the exercise of monopoly power over the one element alleged to be the relevant market. In this case, the undisputed fact of interbrand competition precludes definition of a market limited to servicing Kodak equipment.

**3. *Conduct Issues.*** While purporting to recognize the general rule that a monopolist has no duty to deal with its competitors, the majority below stated that a "monopolist may not refuse to deal with a competitor in an exclusionary attempt to impede competition without a legitimate business reason" and that "a monopolist may not retaliate against a customer who is also a competitor by denying him access to a facility essential to his operations, absent legitimate business justifications." Pet. App. at 16A-17A. It held that (1) there was a triable issue whether Kodak's first two justifications of promoting interbrand competition and reducing inventories (*see* Pet. at 5-6) were "genuine rather than pretextual"; and (2) Kodak's third justification of preventing freeriding by ISOs (*see* Pet. at 6) was illegitimate as a matter of law. Pet. App. at 17A-18A.

The decision below extends to unprecedented limits a monopolist's duty to deal (assuming *arguendo* Kodak's monopoly power). This Court has *never* "required an unregulated monopolist, acting independently, to share its facility with a competitor with which it has had no prior history of dealing." *Florida Fuels, Inc. v. Belcher Oil Co.*, 717 F. Supp. 1528, 1535-36 (S.D. Fla. 1989) (collecting cases). But the decision below imposes just such a requirement and, in effect, forces such a firm to subsidize its competitors unless it can prove its business justification.[16]



To date, this Court has held—at most—that "a monopolist may be guilty of monopolization if it refuses to cooperate with a competitor in circumstances where some cooperation is indispensable to effective competition." *Olympia Equip. Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370, 379 (7th Cir. 1986) (discussing *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985)), *cert. denied*, 480 U.S. 934 (1987).[17] The majority never made the *critical* inquiry: whether providing replacement parts to ISOs (or to customers using ISOs) was indispensable to effective competition.

The record in this case precludes any such finding. While Kodak has for several years followed a policy of not providing replacement parts to ISOs or customers using ISOs, the 18 respondents in this case continue in business and, as the majority observed, "presented evidence that their

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[16] The majority purported to recognize that a Section 2 plaintiff bears the burden of proving lack of business justification. Pet. App. at 17A n.9. But it rejected Kodak's proffered justifications on the basis of speculative inferences, not on the basis of significant probative evidence showing that those justifications did not exist or were not legitimate.

[17] In *Aspen*, the Court upheld a jury verdict holding a monopolist liable for, *inter alia*, withdrawing from an interchangeable ski ticket program. In doing so, the Court found it significant that "interchangeable tickets are used in other multimountain areas which apparently are competitive," and on that basis "infer[red] that such tickets satisfy consumer demand in free competitive markets." 472 U.S. at 603. Thus, the defendant's participation in an interchangeable ticket program could be viewed as indispensable to effective competition.

service is superior to Kodak service." Pet. App. at 13A. Plainly, if respondents can provide superior service without access to parts from Kodak, access to such parts is not indispensable to effective competition. Accordingly, Kodak can have no legal duty to deal.

Moreover, the holding below that Kodak's desire to prevent freeriding by ISOs is illegitimate as a matter of law (*see* Pet. App. at 14A-15A) is contrary to this Court's repeated recognition (in a variety of circumstances) that it is perfectly legitimate for businesses to take steps to eliminate freeriding. *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 762-63 (1984); *Dawson Chemical Co. v. Rohm & Haas Co.*, 448 U.S. 176, 222 (1980); *GTE Sylvania*, 433 U.S. at 55. It also conflicts with the Fourth Circuit's recent decision in *Abcor Corp. v. AM Int'l, Inc.*, 916 F.2d 924 (4th Cir. 1990). In *Abcor*, defendant had for many years allowed ISOs to purchase replacement parts on a same-day basis. In 1988, it terminated this service for ISOs, in part to force ISOs to maintain their own parts inventory rather than freeriding on its inventory by deferring parts purchases until the day they were needed. *See id.* at 929. The Fourth Circuit held that defendant's change in parts policy did "not rise to the . . . level of anticompetitive activity" because defendant merely eliminated plaintiff's " 'free ride' by shifting the inventory cost to the plaintiff." *Id.* at 930. *Abcor* thus recognizes that the desire to eliminate freeriding by competitors *is* a legitimate business justification. Review is warranted to resolve this conflict.[18]

More fundamentally, review is necessary to encourage vigorous, procompetitive conduct. Assuming the existence of monopoly power, even monopolists must be given "some leeway in making business decisions." *Byars v. Bluff City*

[18] The decision below also conflicts with *Olympia*, 797 F.2d at 377, in which the Seventh Circuit held that even a monopolist need not give a competitor a "free ride" by subsidizing the competitor's business.



*News Co.*, 609 F.2d 843, 862 (6th Cir. 1979). And "[a] monopolist has the same right to compete as any other company. Under the antitrust laws, a monopolist is encouraged to compete vigorously with its competitors and to remain responsive to the needs and demands of its customers." *United States Football League v. National Football League*, 842 F.2d 1335, 1360-61 (2d Cir. 1988) (approving jury instructions). The decision below deters brand-name manufacturers from engaging in vigorous competition by exposing them to trials to examine the motives underlying their business decisions, and to the attendant possibility of treble damages liability if a jury does not like those decisions.[19] Review is necessary to prevent this result.

4. ***Consequences of the Decision Below.*** This case has potentially enormous consequences for the way that all firms that are even in part vertically integrated conduct their businesses. Under the decision below, every firm that services and provides replacement parts for its equipment is subject to a finding that it is a "monopolist" in a "market" limited to service of or replacement parts for that equipment, even if there is vigorous interbrand competition. Such a result would affect countless firms in a variety of industries, mostly at the frontiers of the United States' competitive position in hotly contested international markets for equipment and systems sales.

This departure from sound market definition and monopoly power principles, and the majority's holding that there is a triable issue regarding the intent behind Kodak's conduct, both invite groundless antitrust charges whenever an integrated firm modifies its service arrangements to enhance its interbrand competitiveness in a manner not to the liking of intrabrand independent service firms. In-

[19] Two juries have recently returned large verdicts under Sections 1 and 2 against integrated systems manufacturers on similar antitrust theories. *See* Pet. at 13.

dependent service firms that have "adopted" one manufacturer's products as their own service targets will almost always seek shelter in some aspect of the manufacturer's service structure, and then claim an antitrust violation if, in pursuit of systems business, the manufacturer alters its service or parts business in a way that coincidentally upsets their arrangements. The threat that such litigation will survive summary judgment and advance to the point of permitting a jury to find "monopolization" of such a "market" chills precisely the kind of innovation and competition that the antitrust laws are intended to foster. *See Business Electronics*, 485 U.S. at 728 ("[m]anufacturers would be likely to forgo legitimate and competitively useful conduct rather than risk treble damages and perhaps even criminal penalties").

This concern is quite real, not merely academic. As discussed in Kodak's petition, numerous cases are currently pending in the computer, medical equipment and printing equipment industries that involve identical market definition and monopoly power issues and that challenge the same or similar business practices or decisions as are involved here. *See* Pet. at 13-14 & Pet. App. at 42E-43E. This Court's intervention at this time is required to provide uniform jurisprudence in this important area of the law, and to keep the law in the lower courts from becoming even more confused than it already is.



## CONCLUSION

For the foregoing reasons, Kodak's petition for a writ of certiorari should be granted.

Respectfully submitted,

S.T. JACK BRIGHAM III
MARCIA HOWE ADAMS
HEWLETT-PACKARD COMPANY
3000 Hanover Street
Palo Alto, CA 94303
(415) 857-5816

KURT W. MELCHIOR
*Counsel of Record*
NOSSAMAN, GUTHNER, KNOX & ELLIOTT
50 California Street
San Francisco, CA 94111-4712
(415) 398-3600

ROBERT A. SKITOL
JAMES A. MEYERS
PEPPER, HAMILTON & SCHEETZ
1300 Nineteenth Street, N.W.
Washington, D.C. 20036-1685
(202) 828-1200

*Attorneys for*
*Hewlett-Packard Company*

IVOR CARY ARMISTEAD, III
Law Department
Digital Equipment Corporation
111 Powdermill Road
Maynard, MA 01754
(508) 493-3980

*Attorney for Digital Equipment Corporation*

JAMES W. OLSON
Law Department
Unisys Corporation
P.O. Box 500
Bluebell, PA 19424-0001
(215) 986-4105

*Attorney for Unisys Corporation*

STEPHEN WASINGER
HONIGMAN MILLER SCHWARTZ AND COHN
2290 First National Building
Detroit, MI 48226-3583
(313) 256-7726

*Attorneys for Prime Computer, Inc.*

FLORINDA J. IASCONE
Wang Laboratories Inc.
1 Industrial Avenue
Lowell, MA 01851
(508) 967-6367

*Attorney for Wang Laboratories Inc.*

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